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In the Supreme Court of the United States

OCTOBER TERM, 1953.

No. 27.

S. G. OLBERDING,
doing business as
VESS TRANSFER COMPANY and
CHARLES DARNELL,
Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITIONERS' REPLY BRIEF.

W. C. WELDORN,
MILFORD M. MILLER,
Evansville, Indiana,
Counsel for Petitioners.

W. L. MITCHELL,
Evansville, Indiana,
Of Counsel for Petitioners.

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I.

Questions 4 and 5 of Petition for Writ of Certiorari (R. 13, 14) present the question of the want of due process in this cause as follows:

Question 4: May a defendant in this action for personal judgment be brought into court by constructive service of process, when personal service, though had, would be unavailing? And,

Question 5: Does the United States District Court obtain jurisdiction over the persons of the defendants by service of process upon the Secretary of State when per-

sonal service upon the defendants in or out of the District would be ineffective over defendants' objection?

The answers to these questions is obvious. Process may not issue in an action for damages to property to be served without the state.

Rule 4(f) 28 U. S. C., Federal Rules of Civil Procedure.

And service of process issued by the United States District Court where neither plaintiff nor defendants are citizens of the State or resident therein is unavailing to obtain jurisdiction of the defendants or the particular action over the objection of defendants.

The issuing of this process to be sent by mail to defendants in another state cannot be of greater force or effect than actual service on the parties in the United States District Court. The fallacy of this procedure is pointed out by Circuit Judge Maris in the recent case cited in Respondent's Brief, p. 14. *McCoy v. Siler* (1953) C. A. 3, 205 F. (2d) 498 at p. 501.

There is want of due process in this procedure. The judgment herein is without due process because defendants over their repeated and seasonable objections were brought into court, subjected to trial and judgment, upon substituted process when personal service would have been unavailing. This question was presented on motion of defendant to quash the process and dismiss the action. (R. pp. 3, 4, 5, 6, Points 3 and 4 and R. p. 18 (a) (d).)

II.

There is a denial of equal rights to the defendants in this action because:

First, the right to personal judgment is based directly upon personal service of process.

The United States District Court required defendants to go to trial and judgment upon substituted service of process and rendered personal judgment against these defendants upon substituted service and over their continued objection when personal service could not have been had to be served without the state and if had and served within the state would have been invalid.

The judgment is a denial of equal rights to the defendant because without due process and made upon substituted service when the law governing the right to personal judgment requires personal service of process.

Second. The right of defendants to be sued only in the District of their physical habitation is denied them by an arbitrary application of the doctrine of waiver of venue.

The application of Sec. 188.020 of the Kentucky Revised Statutes is not confined to the use of the highways of the state by non-residents but is extended by its express terms to the operation of motor vehicles by a non-resident anywhere "within this state."

Since prior to the passage of this Non-Resident Motorist Act the operation of a motor vehicle within the State of Kentucky was not a waiver of venue in any action against the operator in any court and the Non-Resident Motorist Act itself has no relation to the venue of actions, the holding that such operation of a motor vehicle anywhere within the state is and constitutes a consent to be sued and a waiver of the venue privileges of the defendant in a United States District Court is a denial of the defendant's venue privileges under the Federal Venue Act and is discriminatory against a non-resident defendant. The holding is also discriminatory against non-resident defendants because to obtain a personal judgment against resident defendants substituted or constructive service of

process is unavailing, while the decision herein upholds a personal judgment against these non-resident petitioners obtained over their objections upon substituted or constructive service of process.

Petitioners respectfully urge that the judgment herein should be in all things reversed.

WILLIAM C. WELBORN,
MILFORD M. MILLER,
Attorneys for Petitioners.

WILLIAM L. MITCHELL,
Of Counsel for Petitioners.